Datuk Mohd Sari bin Datuk Haji Nuar v Norwich Winterthur Insurance (M) Sdn Bhd

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-455-91
JEMURI SERJAN CJ (BORNEO), MOHAMED AZMI AND GUNN CHIT TUAN SCJJ
15 JULY 1992

Bankruptcy *— Act of bankruptcy — Consent judgment obtained against debtor — Subsequent agreement to pay by instalments — Terms of judgment controlled by agreement — Demand in bankruptcy notice not in accordance with terms of judgment but in accordance with terms of agreement — Non-compliance with either judgment or notice not act of bankruptcy*

Bankruptcy *— Notice — Setting aside — Consent judgment obtained against debtor — Subsequent agreement to pay by instalments — No provision in agreement that in the event of default in any instalment judgment creditor could issue bankruptcy notice — Judgment debtor defaulted in instalments — Whether judgment debtor committed act of bankruptcy — Whether bankruptcy notice was invalid*

In this case a consent judgment had been obtained against the appellant for the sum of $530,000 together with interest thereon at the rate of 8%pa from 5 June 1986 to the date of realization and $350 as costs. Subsequently the appellant offered through his solicitors to pay the said judgment sum by way of monthly instalments of $25,000 each commencing January 1989. The appellant's offer was accepted by the respondent through its solicitors and the respondent issued receipts for seven instalment payments thereafter. No terms or conditions were stipulated to provide for the eventuality of a default in the payment of any instalment. The appellant could not pay the instalments for the months of August to December 1989 inclusive totalling a sum of $125,000. The respondent therefore issued a bankruptcy notice demanding payment of the sum of $505,603.87 being the balance of the amount due on the final judgment obtained by the respondent against the appellant. The appellant applied to set aside the said bankruptcy notice but his application was dismissed in the High Court. The appellant appealed to the Supreme Court where it was contended that the respondent could not issue the bankruptcy notice as it was estopped from denying the agreement for settlement of the judgment sum by way of instalments and that there was no 'default provision' in their agreement. It was further contended that no term could be implied to the agreement that the respondent could issue the bankruptcy notice for the balance outstanding if the appellant defaulted in the payment of any instalment.

Held, allowing the appeal:

(1) There was nothing in the correspondence between the solicitors for both parties to show that there was any term in their agreement that if there was a default in the payment of any instalment,

A then the judgment creditor was entitled to proceed to issue a bankruptcy notice in respect of the balance due on the judgment debt.

(2) The terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an B act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

(3) The demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s 3(1)(i) of the Bankruptcy Act 1967 but was in accordance C with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.

D **[Bahasa Malaysia summary**

Di dalam kes ini suatu penghakiman persetujuan telah diperoleh terhadap perayu untuk jumlah $530,000 berserta bunga di atasnya pada kadar 8% setahun dari 5 Jun 1986 hingga tarikh penghasilan dan $350 sebagai kos. Kemudiannya perayu telah membuat tawaran melalui peguamcara untuk membayar jumlah wang penghakiman itu secara E ansuran bulanan $25,000 setiap bulan bermula dari Januari 1989. Tawaran perayu itu telah diterima oleh penentang melalui peguam-caranya dan penentang telah mengeluarkan resit bagi tujuh pembayaran ansuran kemudian. Tiada terma atau syarat telah ditetapkan untuk bersedia menghadapi kemungkinan keingkaran membayar sebarang F ansuran. Perayu tidak dapat membayar ansuran bagi bulan Ogos hingga Disember termasuk bulan Ogos dan Disember berjumlah $125,000. Penentang oleh kerana itu telah mengeluarkan notis kebankrapan menuntut pembayaran jumlah $505,603.87, iaitu baki amaun yang kena dibayar atas penghakiman muktamad yang diperoleh oleh penentang terhadap perayu. Perayu telah memohon untuk menge- G tepikan notis kebankrapan itu, akan tetapi permohonannya telah ditolak di Mahkamah Tinggi. Perayu telah merayu ke Mahkamah Agung, di mana ia telah dihujahkan bahawa penentang tidak boleh mengeluarkan notis kebankrapan itu kerana ia diestop daripada menafikan perjanjian untuk penyelesaian jumlah penghakiman itu secara ansuran dan bahawa H tiada 'syarat keingkaran' dalam perjanjian mereka. Telah dihujahkan selanjutnya bahawa tiada terma boleh dibaca secara tersirat ke dalam perjanjian itu yang penentang boleh mengeluarkan notis kebankrapan itu bagi baki yang belum dijelaskan jika perayu mengingkari membayar sebarang ansuran.

I **Diputuskan,** membenarkan rayuan itu:

(1) Tidak ada apa-apa di dalam surat-menyurat antara peguam-peguam kedua pihak itu untuk menunjukkan bahawa terdapat apa-apa terma di dalam perjanjian mereka yang jika berlaku ke-ingkaran membayar sebarang ansuran, jadi pemiutang peng-

hakiman berhak untuk meneruskan mengeluarkan suatu notis kebankrapan mengenai baki yang kena dibayar atas hutang penghakiman itu.

(2) Terma-terma penghakiman persetujuan itu adalah dikawal oleh suatu perjanjian di luarnya antara penghutang penghakiman dan pemiutang penghakiman itu melalui peguam-peguam mereka dan kegagalan mematuhi penghakiman itu bukan suatu perbuatan kebankrapan selama terma-terma penghakiman itu dikawal oleh perjanjian di luarnya itu.

(3) Tuntutan pembayaran di dalam notis kebankrapan itu tidak mengikut terma-terma penghakiman persetujuan seperti yang dikehendaki oleh s 3(1)(i) Akta Kebankrapan 1967 tetapi adalah mengikut terma-terma suatu perjanjian yang diikat kemudiannya oleh kedua pihak itu, dan oleh kerana itu kegagalan mematuhi notis sedemikian tidak menjadi perbuatan kebankrapan atas pentafsiran yang sebenarnya Akta Kebankrapan 1967.]

Cases referred to

1 *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601; [1973] 2 All ER 260 (refd)
2 *Re HA Pereira, ex p Pagor Singh (Bhagat Singh)* [1932] MLJ 112 (distd)
3 *Re HB* [1904] 1 KB 94 (folld)

Legislation referred to

Bankruptcy Act 1967 s 3(2)(ii)

Appeal from: Bankruptcy No D2–29–2598–90 (High Court, Kuala Lumpur)

Idrus bin Ibrahim (*Kam Woon Wah & Co*) for the appellant.
Johari bin Baharuddin (*Jagjit Singh & Co*) for the respondent.

Gunn Chit Tuan SCJ (delivering the grounds of judgment of the court): Consent judgment was recorded in the High Court at Kuala Lumpur against one Datuk Mohd Sari bin Datuk Haji Nuar (hereinafter referred to as 'the appellant') on 27 November 1987, for a sum of $530,000 together with interest thereon at the rate of 8%pa from 5 June 1986 to the date of realization and $350 as costs (p 43 of the appeal records).

On 27 December 1988, the appellant, by a letter through his solicitor Messrs Lee & Associates, offered to pay the said judgment sum by way of monthly instalments of $25,000 each commencing on 31 January 1989 (p 22 of the appeal records). Norwich Winterthur Insurance (M) Sdn Bhd (hereinafter referred to as 'the respondent'), through its solicitors Messrs Jagjit Singh, accepted the appellant's offer and in fact issued receipts for seven instalment payments thereafter. No terms or conditions were stipulated by either party through their solicitors to provide for the eventuality of a default in the payment of any instalment. The appellant could not pay the instalments for the months of August to December 1989 inclusive for a sum totalling $125,000. The respondent therefore on 27 March 1990 issued a

bankruptcy notice in Bankruptcy No D2–29–2598 of 1990 demanding payment of the sum of $505,603.87 being the balance of the amount due on the final judgment obtained by the respondent against the appellant on 27 November 1987 (see p 13 of the appeal records).

The appellant then applied to set aside the said bankruptcy notice and the application was heard on 29 October 1991 by VC George J in the High Court at Kuala Lumpur. The learned judge adjourned the case to 31 October 1991, and on that day dismissed the appellant's application to set aside the bankruptcy notice with costs.

In his written judgment, the learned judge stated that 'the effect of the understanding arrived at between the parties, as I see it, is that bankruptcy proceedings will not be effected so long as the agreed instalments are paid'. His Lordship held that the said bankruptcy notice was properly issued 'in that it was in respect of the amount due in terms of the judgment less amounts paid to account'.

On appeal to us, learned counsel for the appellant, Encik Idrus bin Ibrahim, contended that it was not the intention of the parties or the terms of their agreement that if any instalment was not paid, the respondent was at liberty to issue a bankruptcy notice for the balance of the judgment sum. He contended that the learned judge failed to consider that the respondent could not issue the bankruptcy notice for the balance sum outstanding on 27 March 1990 because it was estopped from denying that it had agreed to allow the appellant to pay the judgment sum by way of instalments and that there was no 'default provision' in their agreement. It was also contended that the learned judge had erred in implying a term to the parties' agreement that the respondent could issue the said bankruptcy notice for the balance outstanding if the appellant defaulted in the payment of any agreed instalment. Counsel referred to *Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board*,[1] where the court held that no term can be implied just because, in the light of subsequent events, it may seem reasonable and desirable. The court also held that no term will be implied unless the court can say that both parties must have intended it.

With respect to the learned judge, we cannot find in the correspondence between the solicitors for both parties that there was any term in their agreement that if there was a default in the payment of any instalment, then the judgment creditor was entitled to proceed to issue a bankruptcy notice in respect of the balance due on the judgment debt. In this respect, reference can be made to the local case of *Re HA Pereira, ex p Pagor Singh (Bhagat Singh)*.[2] The facts of that case are different from those in the present case in that there was an order in that case for the payment of the judgment debt by instalments and Mudie J in that case held that the judgment was modified by the order for the payment by instalments and that a bankruptcy notice which is founded on the judgment as it originally stood was invalidated.

In the case of *Re HB*,[3] the UK Court of Appeal held in 1904 that a bankruptcy notice was bad in that it did not require payment of the debt 'in accordance with the terms of the judgment' within s 4 sub-s (1)(g) of the UK Bankruptcy Act 1883, where the judgment had been modified by some collateral agreement. We were referred to the following passage in the judgment of Vaughan Williams LJ in that case:

> In the agreement nothing is said as to whether the whole of the instalments are to be deemed to become due upon default in payment of any one of them, nor is there anything said with regard to the successive executions on the judgment. A sum of £300 was to be paid down on or before the execution of the agreement, and the judgment debt was to be paid by monthly instalments. Default having been made in the payment of three monthly instalments that had become overdue, a bankruptcy notice was issued, and that bankruptcy notice was issued in respect of the whole of the judgment debt. That notice came under the consideration of the registrar upon an application to set it aside, and it was set aside and, in my judgment, rightly set aside, because it is quite plain that under the agreement the sum was not due.

We would also refer to the following passage of Lord Stirling LJ in the same case:

> By a collateral agreement the creditor agreed to accept payment by instalments, and so long as the time fixed for payment of the last instalment had not arrived the creditor could not, consistently with that agreement, enforce payment of the whole judgment debt; that is to say, he could not require payment of the judgment debt 'in accordance with the terms of the judgment'.

Similarly in the present case, the terms of the consent judgment were controlled by an outside agreement between the judgment debtor and creditor through their solicitors, and non-compliance with the judgment is not an act of bankruptcy so long as the terms of the judgment are controlled by that outside agreement.

We should mention here that we have noticed in the notes of proceedings recorded by the learned judge in the court below that reference was made by Encik Idrus to s 3(2) of the Bankruptcy Act 1967. But according to the notes of proceedings recorded by the learned judge and the affidavits filed, there is no evidence nor any statement by either counsel whether the debtor had within the time allowed for payment given notice to the creditor that he disputes the validity of the said notice on the ground of a mistake in it as the sum specified in the notice as the amount due exceeds the amount actually due.

Be that as it may, we were also of the view that the proviso (ii) to s 3(2) was limited to excess demand and therefore not applicable to the instant case where the demand for payment in the bankruptcy notice was not in accordance with the terms of the consent judgment as required by s 3(1)(i) of the Bankruptcy Act 1967 but was in accordance with the terms of an agreement subsequently entered into by the parties, and therefore non-compliance with such notice could not constitute an act of bankruptcy on a strict construction of the Bankruptcy Act 1967.

As we considered that the bankruptcy notice was invalid for the various reasons stated, the appellant's application to set aside the bankruptcy notice in this case should have been allowed. In the circumstances, we therefore allowed the appeal of the appellant from the High Court with costs here and below and ordered that the said bankruptcy notice be set aside. The deposit would of course be refunded to the appellant.

Appeal allowed.

Reported by Prof Ahmad Ibrahim